

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

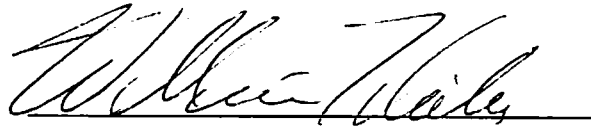
K. A.

vs.

NO. 04-71

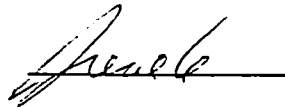
ROANE COUNTY SCHOOLS

FINAL ORDER



WILLIAM T. AILOR,

Administrative Law Judge
AILOR LAW OFFICES
7312 Cersthill Drive
Knoxville, TN 37919
(865) 525-9326

 , 2005

FINAL ORDER

Case No. 04-71

This cause was heard before William T. Ailor, Administrative Law Judge for the Tennessee State Department of Education of Education, on the 17th and 18th days of February, 2005, at the Roane County Board of Education in Kingston, Tennessee. At the hearing, were William Allen, Esq. representing the petitioner(s) with the mother of K.A. and K.A. Also present at the hearing were Deborah A. G. Smith, Esq. Representing the school system along with Ms. Stephanie Walker, Special Education Director for Roane County Schools.

Prior to the commencement of the trial, the parties had submitted motions which the court had ruled on. The respondent had submitted a Motion for Summary Judgment which the court ruled on and granted partial summary judgment leaving three issues to be tried:

- 1) Whether K.A.'s goals - as set forth in his IEP- were measurable and measured;
- 2) Whether the failure to draft a new behavior plan for K.A. is a procedural violation that rises to the level of a denial of FAPE for K.A; and
- 3) Whether the fact that K.A.'s faculty/staff have not yet been trained by K.A.'s new psychologist - Dr. Leonard handler- is a procedural violation that rises to the level of a denial of FAPE for K. A.

An objection was raised by the respondent to the relevance of the number of attendees for the school system at the September 1, 2004 meeting as it relates to the three issues agreed to be tried at the hearing. After a careful review of the evidence and the issues to be tried, the court is persuaded that as the Functional Behavioral Plan is part of the student's IEP, it must have the same formality as the IEP to be a part thereof. Therefor the objection is overruled.

PROOF

K. A. is a 15 year old male student currently enrolled in the Roane County Tennessee School System in the ninth grade attending Roane County High School as a consultative student. (Tr. Vol. 1, P 125). He has been classified as emotionally disturbed for purposes of receiving special education services (Cum. Exhibit A, P 1), and for the school year 2004-2005, he was placed in regular education classes at the High School. The IEP team agreed to keep his IEP essentially unchanged from Middle School to High School in an effort "to build on the success that K.A. had had in the Eighth Grade" (Tr. Vol II. P 24, L 7, 8; P34, L 13; P 85, L 10-22). The petitioner filed a petition for Due Process against the LEA after K.A. was arrested and removed from Roane County High School on October 21, 2004 which appears to have resulted from an emotional outburst. The school had contacted K.A.'s mother the day before to schedule a meeting which was agreed to and set for the 21st of October. However, that meeting did not take place as a result of the situation that arose on the 21st. At a meeting on November 5, the school system agreed to and began to implement modifications in the program of K. A. including but not limited to: 1) appointment of a personal assistant to K.A.; 2) counseling services; 3) a new Functional Behavioral Assessment; and 4) training for K.A.'s teachers by the counselor/psychologist concerning different methods of dealing with K.A.'s emotional disability. On November 29, 2004 the court held a conference call with the parties and entered a scheduling order in which the court ordered that the school system have the Functional Behavioral Assessment results "tester give them a preliminary report as soon as possible after the assessment and prior to the final report. The school system shall convene an interim IEP Team which will implement as interim Behavioral Plan based on the preliminary report until such time as the parties try this case [or it] is disposed of."

A Functional Behavioral Assessment was conducted on December 3, 2004 by Dr. Fancine Reynolds, PhD. Her written assessment was distributed to the IEP Team at a meeting on December 17, 2004 (Exhibit B, Tab 5 and 6). Two other IEP meetings were scheduled by the LEA, but were cancelled due to illness. By the date of the Due Process hearing on February 17, 2005, no IEP team meeting had been held to revise the Behavior Plan (Tr., Vol 1, P. 96, L 5-8).

At the November 5 meeting, the school system agreed to have the staff trained by the counselor/psychologist who would be providing counseling services to K.A. The IEP specifically stated that Psychotherapy Associates would do the counseling. Ms. Walker stated that she wrote the parents a letter after finding out from them that Psychotherapy Associates could not schedule K.A. and she requested that the parents let her know in writing of other agencies they would agree to doing the counseling or whether they wanted to wait until Psychotherapy Associates would do the counseling. And she testified that she did not hear back from the parents (Tr. Vol 1, P 198 L 9).After you [REDACTED] told me [Ms. Walker] on December the 14th at the deposition, or handed me the bill, we send Dr. – we tried to get in touch with him on January the 18th20 and 21. ...then we were able to get a letter to Dr. Handler dated February 2nd with a contract. And also in that, requesting if he would be willing to do training for us. And that was mailed on February the 4th. And as of 2/14/05, I have not heard back from Dr. Handler concerning our request for counseling (Tr. Vol. 1, P 194 L 3-18)

Findings of Fact and Conclusions of Law

After a review of the record, listening to the testimony of the witnesses, the Court having had an opportunity to observe them and weigh and determine their credibility and a review of the

exhibits in the record as a whole from all of which the Court finds concerning the issues to be tried as follows:

1) Whether K.A.'s goals - as set forth in his IEP- were measurable and measured;

The petitioner argues that under 20 U.S.C., 1414(d); 34 C.F.R. 300.347; Tenn Admin. Rules & Regs 0520-1-9.11 that in order for goals and objectives to be meaningful and measurable the IEP must contain adequate, objective data by which to measure the student's progress in the areas identified as deficits. Board of Education of Rhinebeck Central School district, No. 02-041, May 5, 2003, 39 IDELR 148, 103 LRP 25895 and that the goals and objectives set forth in K.A.'s IEP do not comply. The testimony of the respondent's witness, Mr. Bill Ardison, would tend to support that argument. When discussing the Present Levels of Performance, Mr. Ardison admitted that from the IEP, he "did not think it makes it entirely clear" (Tr. P 15, L 5- 9). However, the testimony of Ms. Pam Harrison, school psychologist, appears to contradict Mr. Ardison's testimony. Ms. Harrison has a Master's Degree in educational psychology and counselor education and an education specialist degree in educational psychology and counselor psychology (Tr. Vol. 2, P 15, L18-22). Her testimony was that she did attend the May 2004 IEP team meeting, and the purpose of that meeting was to transition [K.A.] to high school (Tr. Vol 2, P 18 L 19- 21). She further testified that they came up with the drafting K.A.'s goals, several of them are taken from a curriculum that we [the school system] has used which were taken from, Basic Social Skills for Youth. It's from Boy's Town, Nebraska. Exhibit B-15 (Tr. Vol 2, P 19 L 12-23). She was asked, "Why are those goals appropriate for somebody with KA's disability?" (Tr. Vol. 2, P 21. L 22) Her response was. that he lacks social skills. and that is part of his disability, and it breaks it down and gives you very specific steps (Tr. Vol. 2, P21, L 24 - P 22, L 13). Then, she was asked why his goals would be

subjective not objective and easily measures. She explained that writing goals for an emotionally disturbed student is not like writing goals that are academic. She used examples to explain the difference and show that academic skills are more easily measured than social skill deficits or emotional difficulties (Tr. Vol. 2, P 22, L 21- P 23, L 10). She was asked if the goals are capable of being measured to which she replied that the IEP states that they will be measured by teacher observation (Tr. Vol. 2, P. 24 - P 25, L 9). Although there is a conflict between the testimony of two employees of the respondent, the court is persuaded that the goals are measurable based on the credibility and testimony of Ms. Harrison.

Petitioner further argues that the goals and objectives are not measured. However, the testimony is that teacher observation is the only way to measure goals and objectives for social skill or emotional deficits as stated above Id..

2) Whether the failure to draft a new behavior plan for K.A. is a procedural violation that rises to the level of a denial of FAPE for K.A.

The school system adopted the IEP of the previous year which was developed on May 7, 2004. On September 1, Ms. A. met with Mr. McLoud and Mr. Ardison who presented her with a new Behavior Plan (Tr. Vol 1, p 43) which Mr. Ardison wrote without the remaining members of the IEP being present. Ms. A. was notified by phone of the meeting. For an IEP to be properly constituted to revise the IEP, it must be conducted in accordance with 34 CFR 300.344 and it must include the parent(s), a regular education teacher, special education teacher, representative of the public agency, a person who can interpret the instructional implications of evaluation results, other individuals who have knowledge or special expertise, and, if appropriate, the child. No other persons were at the September 1, 2004 meeting to change the Behavior Plan, but Mr. Ardison stated that he gave Ms. A. the revised Behavior Plan (Tr. Vol. 1,

P 39, L 14-16) which is Exhibit C, Tab 4. That Behavior Plan was signed later by various teachers. Some on September 10 and some on September 13 (Tr. Vol. 1, P. 39-40). Mr. Ardison also testified that there was not a meeting with K.A.'s teachers to discuss the Behavior Plan (Tr. Vol. 1, P 40). He simply wrote it and presented it to Ms. A. and the teachers for their signatures later as a result of incidents which happened. Ms. Pam Harrison, school psychologist, testified that "this Behavior Plan is part of this IEP. So it's not a separate document" (Tr. Vol 2, P 32 L 5. 6).

Based on the testimony of Ms. Harrison and Mr. Ardison, it is the court's opinion that the actions of Mr. Ardison of preparing a Behavior Plan without the entire IEP team being involved and having input into its composition and presenting a predetermined Plan to Ms. A. was a procedural violation.

Fracine Reynolds, PhD conducted the Functional Behavioral Assessment on December 3, 2004 and issued a written assessment which she distributed to the IEP team at the meeting on December 17, 2004 Exhibit B. Tab 5 and 6. Two IEP meetings were scheduled to develop the Behavior Plan. However, as a result of health issues, both of those meetings was cancelled. The petitioner argues that substantive harm to K. A. was caused by failure to have a proper Behavior Plan in place which is manifested in the incidents that occurred after school started. The court is not persuaded that a proper Functional Behavioral Plan would have stopped or even reduced the incidents that occurred.

The next question the court must determine is whether or not this violation is a denial of FAPE. To determine whether it is a denial of FAPE, the court must determine if the violation is a violation of substantive rights of the student. From the testimony presented, it appears that the school system implemented a Behavior Plan in an attempt to deal with the issues. The court

finds that the way the school system implemented the FBA was a violation of IDEA. However, it is determined that the violation did not rise to the level of more than a procedural violation.

3) Whether the fact that K.A.'s faculty/staff have not yet been trained by K.A.'s new psychologist - Dr. Leonard handler- is a procedural violation that rises to the level of a denial of FAPE for K. A.

After the request for the Due Process hearing, the IEP Team agreed to provide training to the teachers and attendants in how to provide appropriate education to K.A. and agreed that the appropriate person to conduct the training would be the psychologist who was going to provide counseling services to K.A. The provider that was agreed to in the IEP was not available. As a result, counseling services could not be provided until the petitioners found another provider. The LEA Special Education supervisor, Ms. Walker, attempted to contact the parents to see if they wanted wait for Professional Psychotherapy Associates or find another provider but never heard back from them (Tr. Vol 1, P. 197-199). Once the parents found a counselor, around January 14, 2005, the LEA attempted to contact him to enter into a contract (Id. at 194-196, 200).

The LEA submitted an affidavit of Dr. Handler which stated that as of February 8, 2005 and that he did not feel that he knew the student well enough to train the staff until he was more familiar with K.A.'s needs. There is no question that as Dr. Handler is the appropriate person to conduct the training.

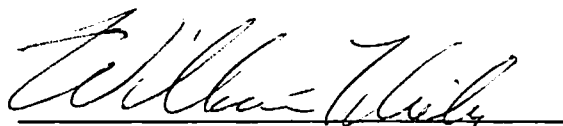
The question is whether the delay in getting the staff trained is a denial of FAPE. Training the staff is an essential part of the IEP. As the LEA agreed on November 5 to provide training and attempted to contact the parents and received no response and Dr. Handler to enter into a contract with him, can they be held liable for the inactions of others? Based on all of the

evidence before the court, it is the opinion of the court that the LEA made a good faith effort to provide the services agreed to and that it can not be held liable for eh actions of others in this matter.

It is the conclusion of the court that although the school system may have been guilty of certain procedural violations, in this case. these violations do not rise to the level of a denial of FAPE.


IT IS HEREBY ORDERED the petitioner's complaint be dismissed.

ENTERED this the 5th day of June, 2005.


WILLIAM T. AILOR
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed in the U. S. Mail, with sufficient postage affixed thereto, to Bill Ward, Staff Attorney, State of Tennessee Department of Education, 5th Floor, Andrew Johnson Tower, 710 James Robertson Parkway, Nashville, TN 37243, Deb Smith, Esq., attorney for school system, SunTrust Bank Building, 201 Fourth Ave. N., Suite 1500, Nashville, TN. 37219-8615 and William A. Allen, Esq. attorney for Parent, 136 South Illinois Ave., Suite 104, Oak Ridge, TN. 37830-6220, on this the 6th day of June, 2005.


WILLIAM T. AILOR

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this order (or thirty [30] days if the Board of

Education chooses not to appeal), the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provisions of this order.